

Admissibility of a reference for a preliminary ruling regarding the issue of a certificate under Article 53 of Regulation No 1215/2012: On the legal nature of the judgment delivered

Case C-579/17

**BUAK Bauarbeiter-Urlaubs- u. Abfertigungskasse
v GRADBENIŠTVO KORANA**

The CJEU published last week a judgment on a request for a preliminary ruling by the Vienna Labour and Social Security Court. The facts of the case are presented under recitals 21-31. The Austrian court referred the following question to the Court:

'Is Article 1 of Regulation ... No 1215/2012 ... to be interpreted as meaning that proceedings involving the assertion of claims by [BUAK] for wage supplements against employers as a result of the posting to Austria of workers without a habitual place of work in Austria for the purposes of performing work or in connection with the hiring-out of workers, or against employers established outside Austria as a result of the employment of workers with a habitual place of work in Austria, constitute "civil and commercial matters" to which the aforementioned regulation applies, even where such claims by BUAK for wage supplements concern employment relationships governed by private law and serve to cover workers' claims to annual leave and payment in respect of annual leave, governed by private law and arising from employment relationships with employers, but nevertheless

- *both the amount of the workers' claims against BUAK for annual leave pay and that of BUAK's claims against employers for wage supplements are determined not by contract or collective bargaining agreement but, instead, by decree of a Federal Minister,*
- *the wage supplements owed by employers to BUAK serve to cover not only the expenses for the payment in respect of annual leave payable to workers but also BUAK's expenses for administrative costs, and*
- *in connection with the pursuit and enforcement of its claims for such wage supplements, BUAK has more extensive powers by law than a private person, in that*
- *employers are required to submit reports to BUAK on specific occasions as well as at monthly intervals, using communication channels set up by BUAK, to take part in and allow BUAK's inspection measures, grant BUAK access to wage and business records and other documents, and provide information to BUAK, failing which a fine may be imposed, and*
- *in the event that an employer breaches its obligations to provide information, BUAK is entitled to calculate the wage supplements owed by the employer on the basis of BUAK's own investigations, whereby, in that case, BUAK has a claim for wage supplements in the amount calculated by BUAK, irrespective of the actual circumstances of the posting or employment?'*

1. The admissibility of the request

Prior to answering the question referred, the Court examined the admissibility of the request. The novelty of the matter lies on the existence or non-existence of a judicial character for the issue of a certificate under Article 53 of Brussels I bis Regulation. In other words, the question was raised after the termination of the proceedings and the publication of the judgment. It came to the surface due to the reservations of the competent Austrian body to issue the above certificate, thus labelling the case with a civil or commercial nature. The answer was given in recital 41:

Consequently, the procedure for the issue of a certificate under Article 53 of

*Regulation No 1215/2012, in circumstances such as those at issue in the main proceedings, **is judicial in character**, with the result that a national court ruling in the context of such a procedure is entitled to refer questions to the Court for a preliminary ruling.*

2. On the civil or commercial nature of the dispute

Following the affirmative answer to the admissibility issue, the Court proceeded to the examination of the legal nature of the case at hand. Its analysis extends to recitals 46-64, wherefrom the following could be highlighted:

- The exercise of public powers by one of the parties excludes a case from civil and commercial matters within the meaning of Article 1(1) of Regulation No 1215/2012 [Recital 49].
- The CJEU held that the Austrian court's powers were limited to a simple examination of the conditions for the application of Paragraph 33h (2b) of the BUAG, with the result that, if those conditions are satisfied, the court cannot carry out a detailed examination of the accuracy of the claim relied on by BUAK [Recital 57].
- In so far as Paragraph 33h (2b) of the BUAG places BUAK in a legal position which derogates from the rules of general law regulating the exercise of an action for payment, by attributing a constitutive effect to the determination by it of the claim and by excluding, according to the referring court, the possibility for the court hearing such an action to control the validity of the information on which that determination is based, it must be concluded that that body acted, in that case, under a public law prerogative of its own conferred by law [Recital 60].
- In such a case, BUAK should be considered to be acting in the exercise of State authority in the context of a dispute such as that which led to the judgment delivered on 28 April 2017, which would have a major influence over the modalities for the exercise of that procedure, and therefore over its very nature, such that that dispute does not come within the concept of 'civil and commercial matters' or, therefore, within the scope of application of Regulation No 1215/2012 [Recital 61].

The Court dedicated only six recitals for the concept of social security and its

exclusion pursuant to Article 1(2) (c) Brussels I bis Regulation [Recitals 65-70], concluding that, on the basis of facts delivered, the case does not come within the concept of social security for the purposes of the provision aforementioned.

3. Some thoughts on the ruling

The significance of the judgment is self-explanatory: Unlike its predecessor, the certificate under Art. 53 Brussels I bis is one of the core documents needed for *direct enforcement* in the country of destination. The previous exequatur stage is abolished; hence, the issue on the legal nature of the case is transferred to the court which would try the application for refusal. Therefore, the decision of the Austrian court to refer the matter to the CJEU should be endorsed; the same goes for the position of the latter in regards to the admissibility issue.

The case resembles a recent judgment of the Thessaloniki Court of 1st Instance, which refused to grant exequatur to a German Notice of the National Association of Statutory Health Insurance Physicians against a doctor of Greek origin, active in the region of Rhineland-Palatinate. As in the case of the Austrian BUAK, the notice was issued ex parte, but no court proceedings ensued in the country of origin. Moreover, the German authorities issued a certificate without questioning the legal nature of the matter at hand. Given that the case fell under the scope of Brussels I Regulation, the Greek judge denied exequatur, stating that the above notice was of an administrative nature, thus falling out of the Regulation's ambit. The case is published in its original text in: *Armenopoulos 2018, pp. 812 et seq.* It is also reported in a case note I prepared for the German journal *Praxis des Internationalen Privat- und Verfahrensrechts*, see: *Nichtanwendung der EuGVVO 2001 auf den Bescheid einer deutschen kassenärztlichen Vereinigung in Griechenland – LG Thessaloniki, 19.12.2017 – 19865/2017, IPRax (forthcoming).*